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When Should Federal Courts Require Psychotherapists to Testify About Their Patients? An Interpretation of *Jaffee v Redmond*

Daniel A. Cantu[†]

Does the right to a fair trial include the right to exclude psychotherapist testimony, no matter how serious the crime or how important the testimony? The Supreme Court in *Jaffee v Redmond*¹ recognized a basic psychotherapist-patient privilege, but left the task of establishing exceptions to that privilege to future courts.²

All fifty states have enacted a psychotherapist-patient privilege of one sort or another.³ Unfortunately, the states vary widely in allowing exceptions to the privilege, leaving federal courts with little consistent guidance.⁴ Some states allow virtually no exceptions.⁵ Others terminate the privilege whenever the patient becomes a threat to others.⁶ Still others exempt entire categories of crime from the privilege,⁷ or recognize no privilege in any criminal trial.⁸

The variation in state privilege law presents a potential problem to federal courts. Federal courts sitting in states with no exceptions risk undermining the law of the state if they allow any exceptions at all. Patients reassured by the presence of a state

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¹ 518 US 1 (1996).

² *Id.* at 18, citing *Upjohn v United States*, 449 US 383, 386 (1981) (explaining that "[b]ecause this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area'").

³ See note 73.

⁴ 518 US at 27.

⁵ See note 74.

⁶ See note 76.

⁷ See note 75.

⁸ See Va Code §§ 19.2, 271.2-271.3 (1997) (specifying husband-wife and priest-penitent privileges but not a psychotherapist-patient privilege); Tex R Crim Evid 509 (1996) (disallowing the privilege in civil cases of child abuse and neglect). See also Va Code § 8.01-400.2 (1997).

privilege may refuse to speak freely if they know their secrets may be revealed in federal court. On the other hand, federal enforcement of a strong privilege in states with many exceptions might prove to be nothing but an empty gesture. Patients unwilling to speak freely to their psychotherapists may simply ignore any federal privilege if the state courts do not protect them.

This problem may occur in the context of any of the evidentiary privileges, but a lack of grounding in history and culture makes it particularly acute for the psychotherapist-patient privilege. The attorney-client privilege has roots dating to the Roman Empire.⁹ The priest-penitent privilege dates back to medieval Europe.¹⁰ The husband-wife privilege dates to the earliest days of English common law.¹¹ The Presidential privilege has its roots in the Constitution's separation of powers.¹² The psychotherapist-patient privilege, however, dates only to the 1950s,¹³ and has not produced the expectations of confidentiality created by the long history and deep cultural roots of the other privileges. Without those expectations, it bears a greater burden in showing that the benefits of preserving confidentiality outweigh the resulting loss of evidence.

This Comment explores the contours of the psychotherapist-patient privilege, beginning with its legal underpinnings, continuing with its impact on relations between doctors and patients, and ending with philosophical, moral and political arguments supporting and opposing exceptions to the privilege. It concludes with a recommendation that federal courts incorporate state privilege law by reference into the federal common law. The proposal avoids undermining state laws, needlessly rejecting relevant evidence, and eliminates the need for a costly and fruitless exploration by the federal judiciary of the merits of the privilege. It also simplifies the law for both therapists and patients.

This Comment includes three parts. Part I discusses the legal basis for the psychotherapist-patient privilege. It examines Federal Rule of Evidence ("FRE") 501, which governs federal evidentiary privileges, and discusses *Jaffee v Redmond*¹⁴ and other Supreme Court privilege cases. Part I ends with an overview of

⁹ Daniel W. Shuman and Myron F. Weiner, *The Psychotherapist-Patient Privilege: A Critical Examination* 49 (Charles C Thomas 1987) ("The Privilege Study").

¹⁰ *Id.*

¹¹ *Trammel v United States*, 445 US 40, 43 (1980).

¹² *United States v Nixon*, 418 US 683, 705 (1974).

¹³ Harvard Law Review Assn, *Developments in the Law - Privileged Communications*, 98 Harv L Rev 1454, 1530 (1985).

¹⁴ 518 US 1 (1996).

the privilege laws of the fifty states.

FRE 501 and the Supreme Court's privilege cases allow courts broad discretion to define and shape privileges in light of "reason and experience."¹⁵ Parts II and III of this Comment explore each of these concepts in detail. Part II reviews the national "experience" with the privilege as summarized in empirical studies on its impact on therapists and patients. Part III discusses "reason" in the form of moral, philosophical and political arguments supporting and opposing exceptions to the privilege.

I. THE LEGAL BASIS FOR THE FEDERAL PSYCHOTHERAPIST-PATIENT PRIVILEGE

Distilled to its essence, federal law allows courts wide discretion to shape privileges "in light of reason and experience."¹⁶ Congress effectively delegated rulemaking authority to the courts by rejecting a detailed privilege statute proposed by the Supreme Court,¹⁷ and replacing it with a procedural guideline that allows courts to establish privileges as they see fit as long as they show due regard for precedent.¹⁸ The Supreme Court in *United States v Trammel*¹⁹ emphasized that FRE 501 provides great flexibility for federal courts to alter privileges over time.²⁰ It made the same point again when it established the psychotherapist-patient privilege in *Jaffee v Redmond*.²¹

A. *Jaffee v Redmond*

The Supreme Court granted certiorari to *Jaffee v Redmond* to resolve a circuit split on the psychotherapist-patient privilege.²² Police officer Mary Lu Redmond, responding to a fight in progress at an apartment complex, shot and killed a suspect allegedly wielding a butcher knife.²³ After the shooting, Redmond participated in approximately fifty counseling sessions with a clinical social worker.²⁴ The victim's estate sued under federal and state law for violation of his constitutional rights by use of excessive

¹⁵ FRE 501.

¹⁶ *Id.*

¹⁷ See Part I C.

¹⁸ *Id.*

¹⁹ 445 US 40 (1979).

²⁰ *Id.* at 47.

²¹ 518 US 1, 8 (1996).

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.* at 5.

force and for wrongful death.²⁵ When the estate sought access to records of the counseling sessions, Redmond claimed a psychotherapist-patient privilege.²⁶

The Court began its analysis with an examination of FRE 501, finding that its direction to define the common law of privilege "in light of reason and experience" allows federal courts the freedom to develop and refine privileges as they see fit.²⁷ The Court noted that the right of the public "to every man's evidence" has guided the common law for centuries, and that privileges offer rare exceptions to that basic principle.²⁸ The psychotherapist-patient relationship justifies an exception to that principle if the need to preserve confidential communications between doctor and patient outweighs the need for probative evidence.²⁹

In the Court's view, the patient has a strong interest in privacy because the possibility of disclosure, resulting in embarrassment or disgrace, may impede development of the therapeutic relationship.³⁰ The privilege protects the public interest by facilitating the provision of appropriate treatment for individuals suffering from mental or emotional problems.³¹ The Court then argued that the privilege will cost little in terms of unavailable evidence because, without a privilege, the patient would refuse to divulge legally damaging information to the psychotherapist in the first place.³²

The Supreme Court then turned to the importance of harmonizing state and federal privilege law, arguing that federal courts should take state policy decisions into account in areas dominated by state law.³³ In light of the unanimous state recognition of the privilege, the Court reasoned that the lack of a federal privilege would undermine the policy decisions of the states because a state promise of confidentiality would have little value if the patient knew that federal courts would not honor it.³⁴

B. Cases Prior to *Jaffee v Redmond*

Before *Jaffee*, the Court had generally limited the scope of

²⁵ 518 US at 5.

²⁶ *Id.*

²⁷ *Id.* at 8, quoting FRE 501.

²⁸ *Id.* at 9, quoting *United States v Bryan*, 339 US 323, 331 (1950).

²⁹ 518 US at 9, citing *Trammel v United States*, 445 US 40, 51 (1980).

³⁰ *Id.*

³¹ *Id.* at 11.

³² *Id.*

³³ 518 US at 12-13.

³⁴ *Id.* at 13.

existing common law privileges. The Court explained its basic position in *United States v Bryan*,³⁵ stating that because "the public . . . has a right to every man's evidence,"³⁶ everyone has the duty to testify, a duty that may be avoided only under exceptional circumstances.³⁷ Using this premise, the Court in *United States v Nixon*³⁸ held that a generalized privilege must give way in light of a strong, demonstrable need for evidence in a particular set of circumstances.³⁹ In *Fisher v United States*, the Court emphasized that a privilege exists only to the extent absolutely necessary to achieve its purpose.⁴⁰

The utilitarian justification of the psychotherapy privilege posits that it encourages confidential communications between therapist and patient.⁴¹ Under *Fisher*, courts should construe privileges narrowly,⁴² enforcing them only when necessary to achieve their purpose. If a state will not protect a particular communication, the patient will ignore the federal privilege, and that privilege will serve no purpose. If, on the other hand, the federal government fails to extend a privilege to a communication protected by the state, it violates *Jaffee* by undermining the law of the state.⁴³

Because states vary a great deal in the coverage of their privilege statutes,⁴⁴ any uniform federal privilege would violate either *Fisher* or *Jaffee* by establishing a useless privilege or undermining state law.

C. Using State Privileges in Federal Cases

This Comment proposes that federal courts should incorporate state psychotherapist-patient privilege law into the federal

³⁵ 339 US 323, 342 (1950) (holding that the secretary of the Joint Anti-Fascist Refugee Committee may not refuse to testify before the House Committee on Un-American Activities and that the House Committee had the authority to subpoena the Refugee Committee's records).

³⁶ *Id.* at 331, quoting John T. Naughton, ed, 8 *Wigmore, Evidence in Trials at Common Law* § 2192 at 70 (Little, Brown 1961).

³⁷ 339 US at 331.

³⁸ 418 US 683, 713 (1974) (holding that an invocation of the executive privilege based only upon a generalized interest in confidentiality cannot prevail over the fundamental demands of due process of law).

³⁹ *Id.*

⁴⁰ 425 US 391, 403, 414 (1976) (holding that accountant's documents in the hands of defendant's attorneys were not protected by the attorney-client privilege).

⁴¹ See Shuman and Weiner, *The Privilege Study* at 5 (cited in note 9).

⁴² 425 US at 403.

⁴³ *Jaffee v Redmond*, 518 US 1, 13 (1996).

⁴⁴ See Part I D.

common law by reference.⁴⁵ Federal courts may incorporate state law into the federal common law when: (1) no federal statute applies, (2) application of a uniform federal standard would impair the functioning of a state law, and (3) there is no overriding federal principle that would demand national uniformity.⁴⁶

In 1939, the Supreme Court first established this principle in *Board of County Commissioners v United States*,⁴⁷ which involved a dispute between the federal government and a municipality over whether a judgment for the United States, in an action to recover illegally exacted county taxes, should include interest.⁴⁸ The Court explained that the absence of either a statute or legislative history left a court free to consider "public convenience."⁴⁹ Finding no reason to place the federal government in a preferred position over aggrieved state taxpayers, the Court held that state law applied.⁵⁰

More recently, in *United States v Kimbell Foods Inc.*,⁵¹ the Court wrote that state interests in preserving uniform property laws override the federal government's interest in tax collection.⁵²

⁴⁵ Under the rule proposed by this Comment, federal courts will at some point have to create a set of decision rules to determine which state privilege law to apply when several different possibilities exist. This might occur, for example, when one state licenses the psychotherapist, but the crime in question occurs in another state. Although a thorough discussion of this question lies beyond the scope of this Comment, one sensible solution would be to apply the privilege law of the state licensing the psychotherapist. This would minimize the confusion of the therapist and protect the expectations of the patient. For a further discussion of this issue, see Earl C. Dudley, *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Georgetown L J 1781, 1836-39 (1994) (discussing the question of vertical choice of law in privilege cases). For a different solution, see *Klaxon Co v Stentor Electric Manufacturing Co*, 313 US 487 (1941) (holding that a federal court should apply the privilege rule that a court of the state where it is sitting would apply under the state's choice of law rules).

⁴⁶ Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, eds, *Hart & Wechsler's The Federal Courts and the Federal System* 765 (Foundation 4th ed 1996) ("The Federal Courts") quoting *United States v Kimbell Foods, Inc.*, 440 US 715, 726-30 (1979).

⁴⁷ Fallon, et al, eds, *The Federal Courts* at 763, (quoting *Board of County Commissioners v United States*, 308 US 343, 349-52 (1939)).

⁴⁸ 308 US at 348-49.

⁴⁹ *Id.* at 351 ("Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, . . . Congress has left us free to take into account appropriate considerations of 'public convenience.' . . . Nothing seems to us more appropriate than due regard for local institutions and local interests.").

⁵⁰ *Id.* at 352 ("In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved taxpayers in their relation with the states or their political subdivisions.").

⁵¹ 440 US 715 (1979).

⁵² *Id.* at 739-40

("[B]usinessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved, . . . Creditors who

The Supreme Court expanded this principle in *Kamen v Kemper Financial Services*.⁵³ The *Kamen* Court held that when state law predominates in a particular area, as it does in corporate law, federal courts should incorporate state law into federal common law.⁵⁴

The psychotherapist-patient privilege presents a classic example of an area in which courts should incorporate state statutes into the federal common law. Despite an opportunity to do so, Congress declined to legislate on the matter.⁵⁵ The applicable federal statute, the Federal Rules of Evidence,⁵⁶ leaves it entirely to the courts.⁵⁷ States have an overriding interest in preserving and protecting the privilege they created.⁵⁸ A uniform federal standard would interfere with state law, and no identifiable principle justifies national uniformity.⁵⁹

One could argue that applying the canon of construction *expressio unius est exclusio alterius*⁶⁰ to FRE 501 suggests that federal courts should not apply state law to federal questions because FRE 501 only requires the use of state privilege law in diversity cases.⁶¹ However, this conclusion ignores both the legisla-

justifiably rely on state law to obtain superior leins would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence. . . . Thus, the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.”).

⁵³ 500 US 90 (1991).

⁵⁴ Id at 98–99. The *Kamen* rule does not apply when state law permits behaviors prohibited by the federal act or undermines the federal policy underlying the act. Id at 99.

⁵⁵ Eric D. Green, Charles R. Nesson and Peter L. Murray, eds, *Federal Rules of Evidence, with Selected Legislative History, California Evidence Code, and Case Supplement* 103–06 (Aspen 1997) (“*Federal Rules of Evidence*”).

⁵⁶ The Federal Rules of Evidence is a statute enacted by Congress. For an explanation of the development of the Rules see Dudley, 82 Georgetown L J at 1798 (cited in note 45).

⁵⁷ FRE 501. See Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb L Rev 511, 519–23 (1994) (arguing that legislative history suggests that because Congress simply could not settle the contours of a privilege, it left the issue to the courts for settlement).

⁵⁸ Shuman and Weiner, *The Privilege Study* at 56–57 (cited in note 9).

⁵⁹ See Part II E.

⁶⁰ *Black's Law Dictionary* 581 (West 6th ed 1990) (“[T]he expression of one thing is the exclusion of another.”).

⁶¹ FRE 501, in relevant part, states:

. . . the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state

tive history and subsequent interpretation of FRE 501.

The Advisory Committee on Evidence of the Judicial Conference had recommended that the rule of *Erie Railroad Co v Tompkins*,⁶² requiring application of state substantive law in diversity cases, not apply to the Federal Rules of Evidence.⁶³ Congress rejected this suggestion. The House Judiciary Committee found no federal interest strong enough to justify departing from state policy when an element of a claim or defense is not grounded upon a federal question.⁶⁴ The House therefore added a provision to FRE 501 that bound federal courts to apply the state's privilege law in actions founded upon a state-created right or defense.⁶⁵ The Senate Judiciary Committee explicitly concurred in this judgment.⁶⁶

The clause of FRE 501 mandating the use of state privilege law in diversity cases responds to the Advisory Committee's suggestion and was never intended to affect resolution of federal question cases. On the contrary, courts must interpret FRE 501 as providing the most freedom of action possible in cases decided under federal law. The Senate Judiciary Committee supported this interpretation when it wrote that FRE 501 reflects the view that privilege rules should be shaped by the courts according to the unique characteristics of each privilege.⁶⁷ The plain language of FRE 501 emphasizes the ability of federal courts to create and define privileges as they see fit, "in light of reason and experience."⁶⁸ The Supreme Court has taken the language and history of FRE 501 as delegating great freedom of action to courts in devising privileges in federal question cases,⁶⁹ as stated in both *Trammel*⁷⁰ and *Jaffee*.⁷¹ Plain language, legislative history, and prior interpretations all show that the language of FRE 501 permits the incorporation of state privilege law in federal matters.

or political subdivision thereof shall be determined in accordance with state law.

⁶² 304 US 64 (1938).

⁶³ Green, et al, eds, *Federal Rules of Evidence* at 104-05 (cited in note 55).

⁶⁴ Id at 105.

⁶⁵ Id.

⁶⁶ Id at 106.

⁶⁷ Green, et al, eds, *Federal Rules of Evidence* at 106 (cited in note 55).

⁶⁸ FRE 501.

⁶⁹ *Trammel v United States*, 445 US 40, 47 (1980).

⁷⁰ Id at 48-50. ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege.")

⁷¹ 518 US 1, 15 (1996).

D. State Psychotherapist Privilege Statutes

All states and the District of Columbia have enacted statutes incorporating the psychotherapist-patient privilege.⁷² State psychotherapist-patient privileges fall into one of four major categories.⁷³ Thirteen states treat the psychotherapy privilege as identical to the attorney-client privilege.⁷⁴ Twenty-two states revoke

⁷² Shuman and Weiner, *The Privilege Study* at 6, 55 (cited in note 9).

⁷³ A majority of states allow otherwise confidential information to be used (1) in involuntary civil commitment proceedings, (2) subject to court-ordered medical examinations, or (3) when the defense raises psychiatric evidence as an element of a claim or defense. All three represent narrow, technical exceptions and none will be discussed in this Comment.

Twenty-six states allow an exemption for involuntary hospitalization proceedings. See Ala Code § 34-26-2 (1991); Alaska Stat § 08.86.200 (Michie 1996); Alaska R Evid 504; Ark R Evid 503; Del R Evid 503; DC Code § 14-307 (1981 & Supp 1997); Fla Stat Ann § 90.503 (West 1979 & Supp 1998); Hawaii R Evid 504.1; Idaho R Evid 503; Ind Code § 25-33-1-17 (1993 & Supp 1997); Ky R Evid 507; La Rev Stat Ann § 510 (West 1995); Me R Evid 503; Md Cts and Jud Proc Code Ann § 9-109 (1995); Miss R Evid 503; Neb Rev Stat § 27-504 (1994); NJ Rev Stat § 45:14B-28 (1995); NM R Evid 11-504; ND R Evid 503; Okla Stat Ann § 12-2503 (West 1993); RI Gen Laws § 5-37.3-6 (1995 & Supp 1997); SD Cod Laws § 19-13-9 (1995); Tenn Code Ann § 24-1-207 (1980 & Supp 1997); Utah R Evid 506; Vt R Evid 503; Wash Rev Code Ann § 18.83.110 (West 1989 & Supp 1998); Wis Stat Ann § 905.04 (West 1993 & Supp 1997).

Twenty-seven states allow an exemption for a court-ordered examination. See Alaska Stat § 08.86.200 (Michie 1996); Alaska R Evid 504; Ark R Evid 503; Colo Rev Stat § 13-90-107 (1993 & Supp 1997); Conn Gen Stat Conn § 52-146c (West 1991 & Supp 1997); Del R Evid 503; Fla Stat Ann § 90.503 (West 1979 & Supp 1998); Hawaii R Evid 504.1; Idaho R Evid 503; Ky R Evid 507; La Rev Stat Ann § 510 (West 1995); Me R Evid 503; Md Cts and Jud Proc Code Ann § 9-109 (1995); Mass Ann Laws ch 233, § 20B (Michie/Law Co-op 1986 & Supp 1997); Miss R Evid 503; Neb Rev Stat § 27-504 (1994); NM R Evid 11-504; ND R Evid 503; Okla Stat Ann § 2503 (West 1993); Or Rev Stat § 40.230 (1997); RI Gen Laws § 5-37.3-6 (1995 & Supp 1997); SD Cod Laws § 19-13-10 (1995); Tenn Code Ann § 24-1-207 (1980 & Supp 1997); Utah R Evid 506; Vt R Evid 503; W Va Code § 27-3-1 (1992); Wis Stat Ann § 905.04 (West 1993); Wyo Stat Ann § 33-27-123 (Michie 1997).

Twenty-nine states provide no privilege for information raised as evidence for a claim or defense. See Alaska Stat § 08.86.200 (Michie 1996); Ark R Evid 503; Conn Gen Stat Ann § 52-146c (West 1991 & Supp 1997); Del R Evid 503; DC Code § 14-307 (1981 & Supp 1997); Fla Stat Ann § 90.503 (West 1979 & Supp 1998); Hawaii R Evid 504.1; Idaho R Evid 503; ILCS ch 225, § 15/5 (West 1996); Iowa Code Ann § 622.10 (West 1950 & Supp 1997); Ky R Evid 507; La Rev Stat Ann § 510 (West 1995); Me R Evid 503; Md Cts and Jud Proc Code Ann § 9-109 (1995); Mass Ann Laws ch 233, § 20B (Michie/Law Co-op 1986 & Supp 1997); Miss R Evid 503 (1996); Neb Rev Stat § 27-504 (1994); NM R Evid 11-504; ND R Evid 503; Okla Stat Ann § 2503 (West 1993); Or Rev Stat § 504 (1997); RI Gen Laws § 5-37.3-6 (1995 & Supp 1997); SC Code Ann § 19-11-95 (1976 & Supp 1997); SD Cod Laws § 19-13-11 (1995); Tenn Code Ann § 24-1-207 (1980 & Supp 1997); Utah R Evid 506; Vt R Evid 503; Wis Stat Ann § 905.04 (West 1993); Wyo Stat Ann § 33-27-123 (Michie 1997).

⁷⁴ See Ala Code § 34-26-2 (1991); Ariz Rev Stat Ann § 32-2085 (West 1992 & Supp 1997); 1997 Colo Rev Stat § 1-90-107 (1993 & Supp 1997); Ga Code Ann § 24-9-21 (Michie 1995); Kan Stat Ann § 74-5323 (1992); Minn Stat Ann § 595.02 (West 1988 & Supp 1998); Mo Ann Stat § 491.060 (Vernon 1996); Mont Code Ann § 26-1-807 (1997); NH Rev Stat Ann § 330-A:19 (1995); NJ Rev Stat § 45:14B-28 (1995); 1997 NY Laws 4507; Pa Cons Stat Ann § 5944 (Purdon 1992 & Supp 1997); Wash Rev Code Ann § 18.83.110 (West 1989 & Supp 1998).

the privilege in trials involving specific crimes, most commonly child abuse and homicide.⁷⁵ Ten states terminate the privilege if the patient poses an imminent threat to an identifiable third person.⁷⁶ Three states allow the court to weigh the value of the evidence obtained against the privacy of the patient on a case-by-case basis.⁷⁷

The wide variation in coverage by the states underscores the difficulty federal courts will have in attempting to define a national privilege. A uniform privilege must either undermine state law as described in *Jaffee*⁷⁸ or serve no useful purpose as discussed in *Fisher*.⁷⁹ Federal courts must choose which type of error they prefer.

II. USING "EXPERIENCE" TO INTERPRET *JAFFEE V REDMOND*

The Federal Rules of Evidence direct courts to define privileges in the light of "reason and experience."⁸⁰ In this context, "reason" implies the use of abstract logic to arrive at a conclusion; "experience" requires that courts bring factual or empirical evidence to bear on their decision. The reasoning of the *Jaffee* Court leads to a series of testable empirical questions.⁸¹ Will patients

⁷⁵ Fourteen states exempt child abuse cases from the psychotherapy privilege. See Alaska Stat § 08.86.200 (Michie 1996); Cal Penal Code § 11171 (West 1992); Conn Gen Stat Ann § 52-146c (West 1991 & Supp 1997); Del R Evid 503; Idaho R Evid 503; La Rev Stat Ann § 510 (West 1995); Minn Stat Ann § 595.02 (1988 & Supp 1998); Neb Rev Stat § 27-504 (1994); NC Gen Stat § 8-53.3 (1986 & Supp 1997); Ohio Rev Code Ann § 2317.02 (Baldwin 1994 & Supp 1996); Vt R Evid 503; Va Code § 8.01-400.2 (1992); Wis Stat Ann § 905.04 (West 1993 & Supp 1997); Wyo Stat Ann § 33-27-123 (Michie 1997). Four states exempt trials involving homicide or other violent crimes. See DC Code § 14-307 (1981 & Supp 1997); ILCS ch 225, § 15/5 (West 1996); Ind Code § 25-33-1-17 (1993 & Supp 1997); Wis Stat Ann § 905.04 (West 1993). Two states exempt all crimes. See Va Code § 8.01-400.2 (1992); Tex R Crim Evid 509. The District of Columbia exempts medical fraud cases. DC Code § 14-307 (1981 & Supp 1997). Nebraska exempts cases involving controlled substances. Neb Rev Stat § 27-504 (1994).

⁷⁶ See Alaska Stat § 08.86.200 (Michie 1996); Cal Evid Code § 1024 (West 1995); Conn Gen Stat Conn § 52-146c (West 1991 & Supp 1997); Mass Ann Laws ch 233, § 20B (Michie/Law Co-op 1986 & Supp 1997); Ohio Rev Code Ann § 2317.02 (Baldwin 1994 & Supp 1996); RI Gen Laws § 5-37.3-6 (1995 & Supp 1997); SC Code Ann § 19-11-95 (1976 & Supp 1997); Tenn Code Ann § 24-1-207 (1980 & Supp 1997); W Va Code § 27-3-1 (1992); Wyo Stat Ann § 33-27-123 (Michie 1997).

⁷⁷ See W Va Code § 27-3-1 (1992); NH Rev Stat Ann § 330-A:19 (1995) (creating an exemption to the privilege when "such disclosure is required by a court order," without specifying the conditions of such order); NC Gen Stat § 8-53.3 (1986 & Supp 1997) (allowing the presiding judge to "compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice").

⁷⁸ 518 US 1, 11 (1996).

⁷⁹ *Fisher v United States*, 425 US 391, 403 (1976).

⁸⁰ FRE 501.

⁸¹ *Jaffee v Redmond*, 518 US 1, 11-12 (1996).

know or understand privilege law? If so, will that prevent them from divulging incriminating information? Will exceptions to the privilege provide useful evidence for courts?

A. Overview of Empirical Studies

Advocates of the psychotherapy privilege have claimed that it will increase the number of patients visiting psychotherapists, encourage patients to begin therapy earlier, and reduce the tendency of patients to withhold information.⁸² Some commentators have assumed that such benefits will accrue to the patient population as a whole.⁸³ This Comment terms this supposition the strong-form hypothesis.

Other commentators argue that the privilege and its limits matter only to patients to whom the limits are consequential, such as individuals with tendencies toward violence, child abuse, or other aberrant behavior.⁸⁴ This Comment calls this second theory the weak-form hypothesis. Studies focusing on both the strong- and weak-form hypotheses fail to show an empirical basis for the psychotherapist-patient privilege.

B. Strong-Form Hypothesis

Daniel Shuman and Myron Weiner tested the strong-form hypothesis through surveys of patients, students, and therapists conducted in three American states and two Canadian provinces.⁸⁵ The tests consisted of three separate surveys.⁸⁶ The first tested the attitudes of participants before and after recognition of the psychotherapist-patient privilege in Texas.⁸⁷ The second survey compared responses of students, patients and therapists in South Carolina and West Virginia before recognition of the privilege with those in Texas after recognition.⁸⁸ The third compared attitudes toward confidentiality in Ontario, Canada, which recognizes no privilege, with those in Quebec, Canada, which recognizes a general right to privacy that covers psychotherapist-patient communications.⁸⁹

⁸² Shuman and Weiner, *The Privilege Study* at 33-37 (cited in note 9).

⁸³ *Id.* at 110-13.

⁸⁴ Daniel O. Taube and Amiram Elwork, *Researching the Effects of Confidentiality Law on Patients' Self Disclosures*, 21 *Prof Psych: Res & Prac* 72, 74 (1990).

⁸⁵ Shuman and Weiner, *The Privilege Study* at 81 (cited in note 9).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Shuman and Weiner, *The Privilege Study* at 81 (cited in note 9).

Shuman and Weiner found no support for the strong-form hypothesis, challenging the basic assumptions of most privilege statutes.⁹⁰ Only 20 percent of the lay participants knew or guessed correctly the privilege law in their area.⁹¹ Although patients regarded confidentiality as important, they looked to the character of the therapist rather than the law to ensure confidentiality.⁹² The number of visits to therapists did not increase in Texas after introduction of the privilege.⁹³ Although 41 percent of patients admitted to withholding information from their therapists, no statistical relationship existed between the lack of a privilege and the number of patients who admitted to hiding something.⁹⁴

Other studies lend support to the Shuman-Weiner criticism of the strong-form hypothesis. Researchers have found that neither the general public nor patients understand privilege law,⁹⁵ and that mental health clients cannot differentiate between privacy as an ethical versus a legal concept.⁹⁶ Patients concerned with privacy focused on the possibility that the therapist might reveal confidences to the employer, family or friends of the patient,⁹⁷ not the courts.

Studies claiming to support the strong-form hypothesis show that the success of therapy depends on trust between patient and counselor,⁹⁸ which presumably forms the basis for the legal privilege. However, a relationship built on trust is more complicated than a legal privilege. If the patient bases her trust on the reliability of her therapist rather than an investigation of the law, courts can obtain evidence without chilling the practice of psychotherapy.

⁹⁰ Id at 110-13.

⁹¹ Id at 111.

⁹² Id.

⁹³ Shuman and Weiner, *The Privilege Study* at 111 (cited in note 9).

⁹⁴ Id at 112.

⁹⁵ David J. Miller and Mark Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof Psych: Res & Prac 15, 15 (1986).

⁹⁶ John McGuire, Phillip Toal and Burton Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof Psych: Res & Prac 375, 381 (1985).

⁹⁷ Id at 377.

⁹⁸ Kathryn Woods and J. Regis McNamara, *Confidentiality: Its Effects on Interviewee Behavior*, 11 Prof Psych 714, 720 (1980) (reporting that individuals receiving the promise of confidentiality were more open in their disclosures than those given instructions of non-confidentiality); Thomas Merluzzi and Cheryl Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 J Couns Psych 245, 250 (1983) (associating a breach of confidentiality in cases involving highly serious client problems with significantly lower patient estimations of therapist trustworthiness).

C. Weak-Form Hypothesis

Some results of the Shuman and Weiner study support the weak-form hypothesis.⁹⁹ About 6 percent of the patients surveyed would have sought counseling earlier had they known about the privilege statute.¹⁰⁰ Of the 41 percent of patients withholding information from their therapist, 13 percent indicated that a legal privilege would have enabled them to be more open.¹⁰¹ More recent studies show that only a subset of patients, those with tendencies likely to make them run afoul of the law, would attach great importance to a legal privilege and its limits.¹⁰²

Yet, does preserving a privilege really serve the patient's interests? Psychologist James Beck studied the impact of nineteen breaches of patient confidentiality in order to warn third parties of possible danger.¹⁰³ Of the nineteen cases, therapy improved in two cases after the breach, did not change in thirteen cases, and worsened in four cases.¹⁰⁴ According to Beck, mistakes by therapists in failing to discuss warnings with their patients or in issuing warnings without good reason, not the lack of a legal privilege, caused bad outcomes in the last four cases.¹⁰⁵ Psychotherapy requires trust, but not necessarily confidentiality.¹⁰⁶ It follows that a breach in confidentiality will not necessarily harm the relationship when the patient believes that the therapist betrayed the confidence for the ultimate good of the patient.

Psychotherapists who convinced patients in advance that the warning would help them as well as the victim strengthened the relationship despite breaching confidentiality.¹⁰⁷ Without the warning, the patients might harm the potential victim and face prison, or perhaps harm themselves.¹⁰⁸ With a warning, the patient would be less likely to succeed in the attack, and both patient and victim would be better off in the long run.¹⁰⁹ Therapists who did not discuss their warning with the patient in advance caused significant harm to the therapeutic relationship in three

⁹⁹ Shuman and Weiner, *The Privilege Study* at 111 (cited in note 9).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 106.

¹⁰² Taube and Elwork, 21 *Prof Psych: Res & Prac* at 72 (cited in note 84).

¹⁰³ James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice after Tarasoff*, 10 *Bull Am Acad Psych & L* 189, 193-95 (1982).

¹⁰⁴ *Id.* at 193.

¹⁰⁵ *Id.* at 199.

¹⁰⁶ *Id.* at 190.

¹⁰⁷ Beck, 10 *Bull Am Acad Psych & L* at 194-95.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

out of four cases.¹¹⁰ When the therapist discussed the issue in advance with the patient, fourteen out of fifteen study trials resulted in a positive or neutral outcome.¹¹¹

The ethical guidelines of the psychiatric profession already require therapists to inform patients about privilege law at the onset of therapy.¹¹² If Dr. Beck's analysis is correct, and if therapists follow their professional guidelines, the lack of a privilege may have few ill effects.

Several other authors support Beck's analysis. One psychoanalyst has argued that strict confidentiality with self-destructive people may prevent patients from facing their behavior.¹¹³ Another researcher has proposed that a limited privilege may, over time, assist patients in controlling problematic behavior.¹¹⁴

D. Value of the Foregone Evidence

Even if a legal privilege provides little benefit to the practice of psychotherapy, it may nevertheless be justified if that small benefit still outweighs the value of the foregone evidence. The *Jaffee* Court emphasized this point when it theorized that patients who realized that their communications would not be legally protected would refuse to divulge incriminating information to their therapists.¹¹⁵ Unfortunately, no empirical study supports the Court's theory, despite its intuitive appeal.

The lack of empirical support appears striking in light of the popularity of some of the exceptions. One such exception limits the privilege when the patient threatens to harm herself or another party.¹¹⁶ Despite its moral appeal and its widespread acceptance in the psychoanalytic community,¹¹⁷ no empirical study has

¹¹⁰ Id at 194. The harm typically consisted of a lack of progress in therapy. Id at 198.

¹¹¹ Beck, 10 Bull Am Acad Psych & L at 194 (cited in note 103).

¹¹² American Psychiatric Association ("APA"), *Guidelines on Confidentiality*, 144 Am J Psyc 1522 (1987) ("Whenever feasible, psychiatrists should inform their patients of the general limits of confidentiality at the onset of treatment.").

¹¹³ Stephen Appelbaum, *How Strictly Confidential?*, 7 Intl J Psychoanalytic Psychotherapy 220 (1978).

¹¹⁴ Jeffrey A. Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential*, 27 Crim L Bull 416, 433 (1991).

¹¹⁵ *Jaffee v Redmond*, 518 US 1, 11-12 (1996).

¹¹⁶ Id at 18, n 19.

¹¹⁷ Charles J. Meyers, *Where the Protective Privilege Ends: California Changes the Rules for Dangerous Psychotherapy Patients*, 19 J Psych & L 5, 6 (1991) (commenting that "[n]o psychotherapist can be licensed to practice in California without passing a test that includes a plumbing of her understanding of her duty to warn and protect"). See also Beck, 10 Bull Am Acad Psych & L at 190 (cited in note 103) (noting that patients in Mas-

tested whether it has actually saved any lives, making it difficult to assess the real benefits with any precision.¹¹⁸ The same is true for the child abuse exception, despite the fact that fourteen states employ it.¹¹⁹

E. Implications of Empirical Evidence

The weak, equivocal data supporting the privilege strengthens the argument in favor of deferring to state law. Federal courts have no clear scientific theory upon which to base a uniform national privilege. An arbitrary federal privilege will interfere with state law for no good reason. Any federal rule that differs from state law will either undermine the state law or exclude valuable evidence without providing a discernible benefit to psychotherapy. Federal courts can avoid both of these problems only by incorporating the privilege law of the states into the federal common law.

III. USING REASON TO INTERPRET *JAFFEE V REDMOND*

The lack of empirical evidence that the privilege confers some benefit does not defeat it. Federal Rule of Evidence 501 refers to "reason" as well as "experience." Reason, when contrasted with experience, refers to moral and philosophical arguments not susceptible to objective proof.

A. Opposing Philosophical and Moral Arguments

Proponents of the privilege typically cite one of two arguments in its favor. The first, known as the utilitarian approach,¹²⁰ supports privileges whenever their benefits to society exceed their costs.¹²¹ Commentators typically assume that the utilitarian approach requires empirical confirmation to support its validity.¹²² The second, variously known as the humanistic approach,¹²³ the deontological approach,¹²⁴ or the privacy ration-

sachusetts, where there is no duty to warn, are routinely warned of the limits of confidentiality).

¹¹⁸ Beck, 10 Bull Am Acad Psych & L at 192 (cited in note 103) (noting the absence of empirical data on whether the duty to warn third parties actually prevents any violence).

¹¹⁹ See note 75.

¹²⁰ Shuman and Weiner, *The Privilege Study* at 46 (cited in note 9).

¹²¹ See McNaughton, ed, 8 *Wigmore, Evidence* § 2285 at 527 (cited in note 36) (arguing that a court should only recognize a privilege when the injury created by disclosure exceeds the benefits gained by the evidence).

¹²² See Shuman and Weiner, *The Privilege Study* at 80-81 (cited in note 9).

¹²³ *Id* at 46.

ale,¹²⁵ supports privileges because of the intrinsic importance of privacy in certain circumstances. Although Supreme Court cases such as *Jaffee*,¹²⁶ *Nixon*,¹²⁷ and *Trammel*¹²⁸ used the utilitarian approach, the Second Circuit,¹²⁹ as well as various commentators,¹³⁰ have employed the humanistic argument, asserting that the court's moral obligation to avoid inflicting psychological harm on the patient justifies the privilege.¹³¹

The utilitarian approach, which assumes the presence of some experiential data, founders on the lack of evidence for the privilege discussed in Part II. In contrast, the privacy argument becomes more compelling.

The privacy arguments emphasize the direct harm of disclosure to the patient. One version identifies two distinct kinds of harm: the embarrassment of having secrets revealed to the public and the forced breach of an entrusted confidence.¹³² The first harm comes from the act of revealing a private matter to the public. The second comes from the sense of loss and humiliation arising from the perception that a trusted adviser, the therapist, has betrayed a personal confidence. Both harms are magnified by the inherent vulnerability of the patient. Psychotherapists create an atmosphere of trust.¹³³ Patients may be less guarded with a therapist than with police, family, or friends. In police custody, a suspect has *Miranda* warnings to remind her that she need not incriminate herself.¹³⁴ With family and friends, experience warns her that her confidences may be betrayed. In psycho-

¹²⁴ *Id.*

¹²⁵ Harvard Law Review Assn, 98 Harv L Rev at 1480-81 (cited in note 13).

¹²⁶ *Jaffee v Redmond*, 116 S Ct 1923 (1996). Although *Jaffee* made reference to the privacy rationale, the bulk of the Court's argument focused on utilitarian arguments. See Part I A.

¹²⁷ *United States v Nixon*, 418 US 683, 711-12 (1974).

¹²⁸ *Trammel v United States*, 445 US 40, 50-51 (1980).

¹²⁹ See *Doe v Diamond*, 964 F2d 1325, 1326 (2d Cir 1992) (holding that a psychotherapist-patient privilege exists because of the importance of personal privacy, the need for informed medical assistance and widespread recognition of the privilege).

¹³⁰ See Shuman and Weiner, *The Privilege Study* at 47 (cited in note 9) (supporting the deontological argument); Imwinkelreid, 73 Neb L Rev at 543-44 (cited in note 57) (supporting the privacy argument over the utilitarian position).

¹³¹ Harvard Law Review Assn, 98 Harv L Rev at 1481 (cited in note 13).

¹³² *Id.*

¹³³ Psychotherapists "are interviewers skilled in providing an atmosphere in which a patient will feel comfortable expressing what he considers the truth about himself, no matter how unpalatable. If these revelations become admissible in court, psychotherapists can find themselves reluctant forensic experts, testifying against their patients as witnesses for the prosecution." Meyers, 19 J Psych & L at 27 (cited in note 117).

¹³⁴ *Miranda v Arizona*, 384 US 436 (1966).

therapy, she may or may not be warned.¹³⁵ If she is warned, she may forget the warning when encouraged to be frank. Therapists take notes and sometimes tape record sessions. They can make formidable witnesses.

As compelling as these arguments appear, they do not obviously trump the moral argument in favor of exceptions, which rests on the value of protecting victims. Just as public disclosure directly harms the patient, releasing the guilty harms the victim. A privilege may deprive the victim of closure in a difficult period of her life. A privilege may express the idea that the legal system values the welfare of the defendant more than that of the victim, reinforcing feelings of low self-esteem or guilt that the crime itself engendered. In child abuse cases, victims are often helpless. The testimony of therapists is unusually relevant in such cases because of the scarcity of other reliable evidence.¹³⁶

This sort of point-counterpoint on the relative harms to the victim and defendant can continue without end. There is no way to compare the harm to patients as a group with that of the class of victims. Moral arguments cannot therefore provide a solid foundation for a principled limitation on the psychotherapist-patient privilege.

B. Institutional Capacities

Legislative judgment should trump that of the courts in balancing competing interests served by evidentiary privileges. While one might worry that state legislatures may compromise the rights of a politically unpopular minority such as mental patients, the actual politics of the psychotherapist-patient privilege may benefit patients.

The proponents of the psychotherapist-patient privilege include organized interest groups such as the American Psychological Association¹³⁷ and the American Psychoanalytic Association.¹³⁸ The therapists' interests coincide with those of the patients, a group otherwise less likely to enjoy effective political representation. For clinicians, testifying takes time away from professional practice, heightens patients' natural hesitation to reveal their thoughts, and subjects them to cross-examination by hostile counsel. Groups opposing a privilege, such as victim's advocacy

¹³⁵ See APA, 144 Am J Psychiatry at 1522 (cited in note 112).

¹³⁶ See *United States v Burtrum*, 17 F3d 1299, 1302 (10th Cir 1994).

¹³⁷ *Jaffee v Redmond*, 518 US 1, 35 (1996) (Scalia dissenting).

¹³⁸ *Id.*

groups, state prosecutors, and law-and-order politicians, lack a unifying organization and therefore suffer free-rider problems because many of the supposed benefits of their position will accrue to others.¹³⁹

Politicians, responding to the needs of therapists, will at the same time protect the interests of the politically weakest group, the patients. Because of this structural bias in favor of the privilege, legislative passage of exceptions would require an overwhelming public sentiment. Federal courts have no reason to override the judgment of the legislatures in order to protect the rights of a disenfranchised minority.¹⁴⁰

The Supreme Court has noted that the balancing of competing political interests in defining legal privileges is particularly a legislative function.¹⁴¹ As the Supreme Court noted in *Jaffee*, the uncertainty created by determining the scope of a privilege on a case-by-case basis would defeat its purpose.¹⁴² The scope of the privilege must instead be determined by broad philosophical, political and psychological arguments. All fifty state legislatures have implicitly reached this conclusion by enacting the psychotherapist-patient privilege as statute, rather than deferring to the common law. Since Congress has declined to act on the privilege,¹⁴³ the second-best solution for federal courts is to incorporate the action of state legislatures into the federal common law.

CONCLUSION

Reduced to its fundamental premises, the *Jaffee* Court based the psychotherapist-patient privilege on: (1) the interest of the patient in privacy, (2) the interest of the public in effective therapy, (3) the assumption that patients will not divulge incriminating secrets, even if it limits the chance of successful therapy,

¹³⁹ Id at 36 (Scalia dissenting) (noting that no one filed amicus briefs against the psychotherapist-patient privilege because no self-interested organization devotes itself to the pursuit of truth in federal courts).

¹⁴⁰ For an argument that federal courts should overrule legislative action in order to protect minorities, see John Hart Ely, *Democracy and Distrust* 136 (Harvard 1980) ("[n]o matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account. 'One person, one vote,' under these circumstances, makes a travesty of the equality principle.").

¹⁴¹ *University of Pennsylvania v EEOC*, 493 US 182, 189 (1990) (commenting that courts should not establish a privilege when the legislature declined to do so because the balancing of conflicting interests is particularly a legislative function).

¹⁴² 518 US at 17.

¹⁴³ Green, et al, *Federal Rules of Evidence* at 103-06 (cited in note 55).

and (4) the importance of not undermining the privilege law of the states.

Upon investigation, the first three interests become insignificant. The victim's interest offsets the patient's interest in privacy.¹⁴⁴ The possibility that a skillful therapist can avoid the negative consequences of disclosure moots the interest of the public in effective therapy.¹⁴⁵ The fact that most patients know nothing about privilege law negates the assumption that patients will not divulge personal secrets without a privilege.¹⁴⁶ Only the last argument remains valid. Lack of a federal privilege would undermine individual state policy.

Federal courts have begun to face litigants arguing for exceptions to the psychotherapist-patient privilege.¹⁴⁷ To settle these issues, federal courts should use the state privilege law governing the therapist, even for federal questions.¹⁴⁸ This conclusion follows from existing law, which allows the incorporation of state law into federal questions when: (1) no federal statute applies, (2) application of a uniform federal standard would impair the functioning of state law in that area, and (3) no overriding federal principle exists that would demand national uniformity.¹⁴⁹ All three factors apply in this case.

The relevant federal statute, FRE 501, establishes a process, not a substantive law. It mandates that federal courts develop privileges through the common law in light of reason and experience, providing no criteria for comparing privileges. The first criterion is therefore satisfied.

In addition, a uniform national standard would impair the functioning of state laws, meeting the second criterion. Faced

¹⁴⁴ See Part III A.

¹⁴⁵ See Part II B.

¹⁴⁶ Shuman and Weiner, *The Privilege Study* at 111 (cited in note 9).

¹⁴⁷ See, for example, *United States v Hansen* 955 F Supp 1225, 1226 (D Mont 1997) (holding that the psychotherapist-patient privilege for a homicide victim terminates upon death based on a broad interpretation of FRE 501).

¹⁴⁸ The *Jaffee* Court placed one restriction on the psychotherapy privilege: lower courts may not balance the patient's privacy interest against the court's need for evidence on a case-by-case basis. According to the Court, a case-by-case balancing test would make the privilege uncertain, and an uncertain privilege is little better than no privilege at all. See *Jaffee v Redmond*, 518 US 1, 17 (1996) (criticizing the psychotherapist-patient privilege statutes of Maine, New Hampshire, North Carolina and Virginia for mandating that courts enforce the privilege on a case by case basis). See *id* at 18 n 18 (citing Me Rev Stat Ann Tit 32 § 7005 (1964)); NH Rev Stat Ann § 330-A:19 (1995); NC Gen Stat § 8-53.7 (1986); VA Code Ann § 8.01-400.2 (1992). Because of Supreme Court precedent, federal courts cannot defer to the privilege law of these states and must instead depend on traditional common law reasoning, which would likely lead to multiple exceptions to the privilege in these states.

¹⁴⁹ See Part I C.

with different state and federal privileges, therapists and patients would inevitably conform their conduct with the weaker of the two. The only way for federal courts to avoid this problem, establishing a privilege with no exceptions, wastes potentially valuable evidence and violates the rule of *Fisher* that privileges exclude the least amount of evidence possible.¹⁵⁰

The psychotherapist-patient privilege satisfies the third point because no overriding federal principle exists that would demand uniformity in light of either reason or experience. Moral principles can either support or oppose exceptions. A utilitarian analysis offers no better guidance without reliable empirical data. Although a substantial argument supports the contention that a legislature rather than a court should make the ultimate decision, Congress has refused to address the matter and establish a national privilege law.

With no substantive federal law to apply, the prospect that a national common law would undermine the laws of the states, and no reason to establish national standards, the federal courts should incorporate state law. Such an approach has the virtues of simplicity and ease of administration. Courts need not waste their time in a fruitless search for national standards, and therapists and patients need not concern themselves with the vagaries of conflicting state and federal standards. Federal courts need not apply unfamiliar law, because they already must apply state privilege law in diversity cases. Precedent, reason and experience lead to a single conclusion: federal courts should use the law of the state in which they sit to identify exceptions to the federal psychotherapist-patient privilege established under *Jaffee v Redmond*.¹⁵¹

¹⁵⁰ *Fisher v United States*, 425 US 391, 403 (1976).

¹⁵¹ 518 US 1 (1996).